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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION  
OF ST. LOUIS, a Corporation,  
Petitioner,

vs.

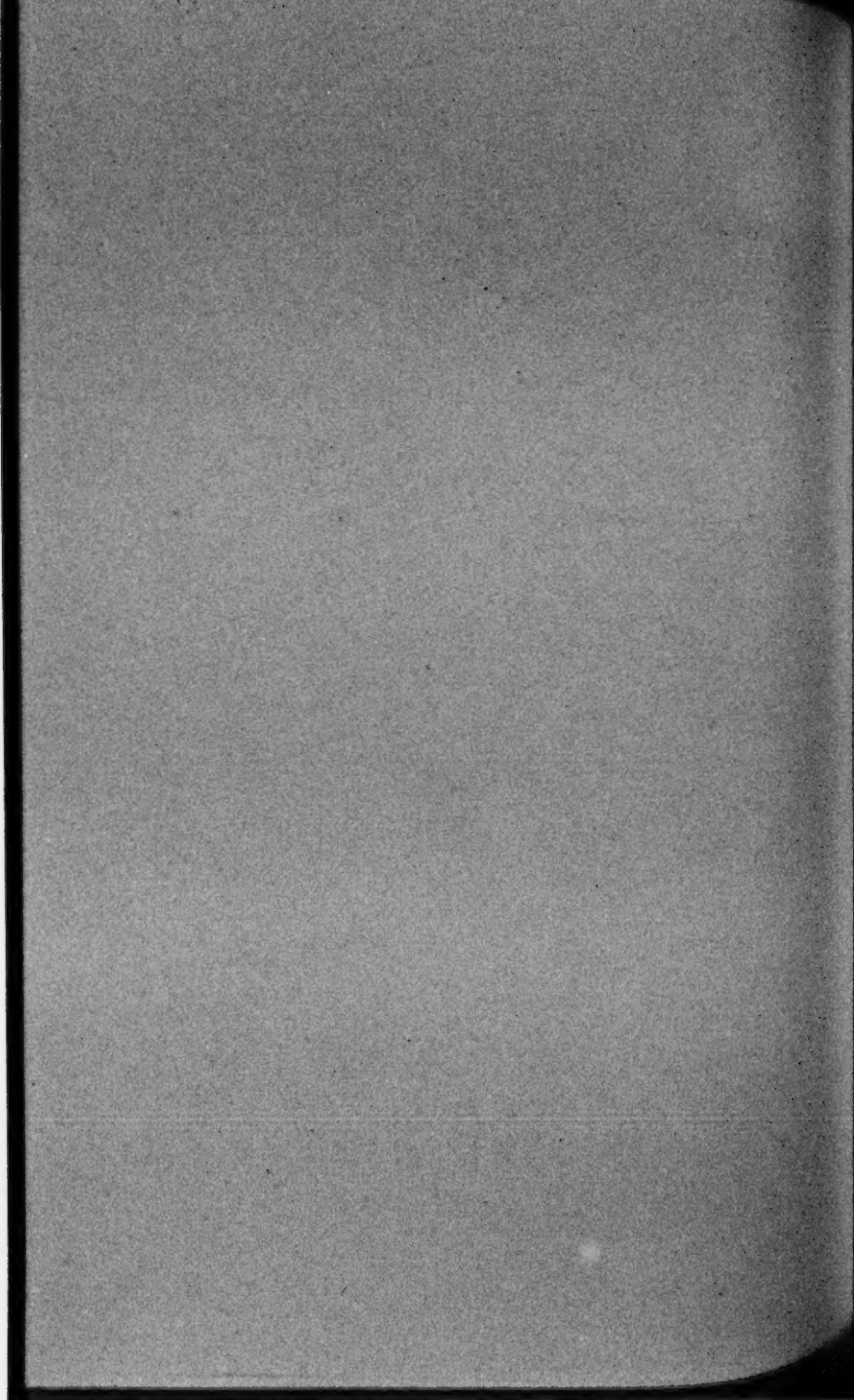
JULIA C. MILLER, Administratrix of the  
Estate of Ernest F. Miller, Deceased,  
Respondent.

No. 433.

**PETITION FOR REHEARING**  
and  
**BRIEF IN SUPPORT.**

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TERMINAL RAILROAD ASSOCIATION  
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JULIA C. MILLER, Administratrix of the  
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Respondent.

No. 433.

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**PETITION FOR REHEARING.**

Comes now petitioner in the above cause, within twenty-five days from the entry of the order of this Court denying its petition for the issuance of writ of certiorari, and prays this Court to rehear and grant such petition. As grounds therefor petitioner says:

I.

It has unintentionally failed to emphasize the significance of its unusual relation to the railroad companies which use its rails and other facilities in St. Louis, Missouri.

The decision of the Court below is based solely on the applicability of the lessor-lessee doctrine. The holding is that because decedent's injury occurred in Illinois, where the state courts apply that doctrine, petitioner is liable merely because it permitted the M. & O. to use its tracks.

It must be borne in mind that the lessor-lessee rule is founded upon the theory of a voluntary failure on the part of a railroad company to fulfill its franchise obligations and perform its franchise duties, "so far as the general public is concerned." *Hulen v. Wheelock*, 300 S. W. 479, 485. The key words are "voluntary" and "general public." As we understand the principle, it is at no time applicable unless the failure to perform is voluntary rather than involuntary, and is to be invoked only upon such voluntary failure to perform its duty to the public.

Is petitioner subject to this principle of law, or do the facts here place it beyond the boundaries of its influence? Petitioner says it is not to be governed by that principle because:

1. It has not voluntarily surrendered its road to another; but to save its corporate life has been compelled by this Court to permit other railroad companies to use its facilities "upon such just and reasonable terms as shall place each user upon a plane of equality" of burdens and benefits with every other user. *U. S. v. Terminal Railroad Association*, 224 U. S. 383, 56 L. ed. 810, 820.

2. It has neither failed to perform its duties under its charter "so far as the general public is concerned." *East Line, etc., Ry. Co. v. Culbertson* (Tex. Sup.), 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 807; *Williard v. Spartanburg, U. & C. R. Co. et al.*, 124 F. 796, 800; nor escaped "responsibility for the performance of the public duties for which it was chartered." *Hulen v. Wheelock* (Mo. Sup.), 300 S. W. 479, 485 (not published in the official reports).

3. Petitioner's charter purposes were to furnish facilities for the use of trunk line railroads. Therefore, it was scrupulously fulfilling its franchise duties by permitting M. & O. to use its rails.

## **BRIEF IN SUPPORT OF PETITION FOR REHEARING.**

### **I.**

Has petitioner voluntarily surrendered its railroad facilities to another? To answer the question we turn to two decisions of this Court: *United States v. Terminal Railroad Assn.*, 224 U. S. 383, 56 L. ed. 812, and *United States v. Terminal R. R. Assn.*, 236 U. S. 194, 59 L. ed. 535.

In the first of these cases the United States filed a bill against petitioner seeking its dissolution on the ground that it and a number of associated companies had violated the Sherman Act by creating a combination in restraint of interstate commerce and a monopoly forbidden by that law. This contention was based upon the theory that petitioner's proprietary lines, acting through petitioner, could prevent other lines of railroad who so desired from serving St. Louis, because petitioner's facilities were the only means of ingress and egress, thereby giving petitioner and its proprietary lines a monopoly upon St. Louis railroad traffic.

The cause was heard by four circuit judges who, because of an equal division in judgment, dismissed the bill. The United States took the case to this Court, which determined that there had been a violation of the Sherman Act, and ordered petitioner's dissolution unless it met seven requirements set out in the opinion, one of which was that petitioner should provide "for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies." *United States v. Terminal R. R. Assn.*, 224 U. S. 383, 411, 56 L. ed. 810, 820.

Assuming, solely for argument, then, that a charter duty rested upon petitioner to permit none but its own trains and motive power to move over its lines, has petitioner "voluntarily" surrendered its road to another, or voluntarily permitted other railroads to use its facilities? Under this Court's decree, *supra*, unless petitioner permits all railroad companies who so desire to use its facilities "upon a plane of equality in respect of benefits and burdens with the present proprietary companies," it will be dissolved, on the ground that it is a member of a combination in restraint of interstate commerce under the Sherman Act. On the other hand, if it complies with this Court's order the Missouri Supreme Court holds it has "voluntarily" surrendered "its road to another," and is consequently liable for the acts of the user. It cannot be the law that petitioner must under this Court's mandate permit all trunk-line railroads to use its facilities and at the same time be held responsible for the acts of each trunk-line user of its facilities, on the ground that it has "voluntarily" turned over such facilities to such trunk line users.

The principle involved in *Denton v. Yazoo & M. Valley R. Co.*, 284 U. S. 205, 76 L. ed. 310, is closely analogous. In that case the Court held that where the railroads, under Congressional Act, were obliged to "furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post office cars," etc., the defendants were not responsible for injury to a mail clerk resulting from the negligence of a servant in the general employ of the defendant railroad companies, while loading mail into a mail car under the direction of a United States postal transfer clerk, and was not, as to that work, under the direction or control of either of the railroad companies.

In the case at bar the defendant was compelled by direction of this Court "to lend" its facilities to the trunk-line

railroads, just as in Denton's case the defendants were compelled "to lend" their employee. The salutary rule announced in Denton's case, which relieved the defendants of liability because of their compliance with their legal duty, is by the stronger reason applicable in the case at bar where the subject matter "lent" by legal command, is an inanimate facility, the physical condition of which was admittedly in no way responsible for decedent's death.

## II.

Has petitioner failed to perform any of its charter duties which are due the public? Unless it has "voluntarily" abandoned the operation of its facilities (discussed supra), to the detriment of the public, the principle of lessor-lessee liability cannot be decisive. Being a public utility it has certain obligations which are implicit in its charter, the principal one of which is, of course, the performance of its duty to the public as such a utility.

Originally the rule was created to cover instances where A railroad company transferred all of its property to B railroad, and made no pretense of operating a railroad, whereas B railroad operated its own trains over A's line and was in complete control of all of A's facilities. Thus, if so minded, A company could turn over its properties to B company, a wholly irresponsible corporation, and the public would have no redress whatever for torts committed in the operation of the railroad properties. Moreover, one injured by the operations of B company and who knew nothing of the relations between that company and A company, "might be at loss to determine against which to bring his action and thereby be placed at a disadvantage in seeking redress." *East Line etc. Ry. Co. v. Culberson* (Tex. Sup.), 10 S. W. 706, 3 L. R. C. 567, 13 A. St. Rep. 807; *Williard v. Spartanburg, U. & C. R. Co. et al.*, 124 F. 796, 800.

Respondent's decedent was not a member of the public, but was one of petitioner's employees who knew, of course, that he was such employee, that he was riding on one of his employer's trains, and that the M. & O. used his employer's tracks. This knowledge was in his widow, the respondent, as well as in her counsel. This record so shows, as respondent took and introduced in evidence the deposition of the conductor of the M. & O. train. Therefore, in this particular case, there was no member of the public involved. How then could petitioner's duty towards the public be an element?

It is, therefore, demonstrated not only that petitioner has not "voluntarily" turned over its property to another railroad company, but just as conclusively, that no member of the public and no duty owed by petitioner to the public are involved in this action. The reason for the lessor-lessee rule, therefore, does not exist under the facts in this case. Why then should the rule be applied?

Viewed from a different point we find that there is but one fundamental justicial reason for the existence of the rule which makes an owner railroad company liable for the acts of a user railroad company, viz., the voluntary failure of the former to fulfill its franchise obligation to the public to operate a railroad. When this principle ceases to govern, necessarily the responsibility created by it is at an end.

The determining factor here then is basic rather than derivative. Thus, as between owner and user, the responsibility is fixed by the law of contracts, i. e., breach of the franchise or charter—the owner's contract with the state; but as between the owner and the injured person, responsibility is fixed by the law of torts. Before liability can arise under the law of torts there must be a defendant's breach of duty resulting in injury to one to whom the duty is owed. Obviously the existence of the duty is essential; and it cannot exist unless created

by law. Before there can exist liability in tort, therefore, there must be: (1) a duty, (2) breach thereof by defendant, and (3) resulting injury to the person to whom the duty runs.

In the case at bar the first requisite (a duty) is absent. We cannot but feel that in our petition for writ of certiorari we failed to make this clear.

Was there any duty cast upon petitioner in the premises? It was admittedly no physical act on the part of petitioner which caused respondent's husband's death. It could have been guilty of none except through decedent, who failed to flag the oncoming M. & O. train. Had such failure caused his death, there could have been no recovery here in any event, as he would have been the author of his own undoing. *Atlantic Coast Line v. Driggers*, 279 U. S. 787, 73 L. ed. 957.

Thus respondent is driven to the position that the act which produced her husband's death was done by M. & O. What duty then did petitioner owe decedent? Under the terms of the Federal Employers' Liability Act (hereinafter called the Act) liability of an employer railroad company is based only upon negligence of such railroad company. It is not claimed here that petitioner was guilty of an act of negligence in fact, but only of negligence in law—that is, a legal rather than a factual breach of duty. But before there can be a legal (as here used) breach of duty, the law must create the duty. Under the facts here there is but one possible theory of the creation of that duty, i. e., the fact that M. & O. was running its train over petitioner's track, which alone can create a duty upon petitioner to see to it that M. & O. was guilty of no negligence. Unless this duty was cast upon petitioner by the mere fact that M. & O. was permissively using petitioner's track, no duty rested upon petitioner to make certain M. & O. was not negligent.

Does the law cast such duty upon petitioner? Does it come within the general rule, federal or state, or does it come within an exception to that rule?

The basis for the lessor-lessee rule is that a railroad company's charter is a contract between it and the granting authority that the railroad company will properly and legally exercise its franchise rights and fulfill its franchise obligations or duties to the public. So long as it properly and legally exercises its charter rights and meets properly its charter obligations, just that long does it fulfill its duties both to the charter granting authority and the public. It may not be said with any degree of logic that a railroad company may be penalized or may in any way incur liability for damages merely because it is exercising its charter rights and fulfilling its charter obligations. We shall inquire then whether or not petitioner has broken its charter.

### III.

Has petitioner failed in any manner, voluntarily or involuntarily, to fulfill its charter duties, public or private? In 1874 the Union Depot Company of St. Louis was organized to construct a union depot in that city and to lay the necessary tracks for the use of such depot when ready for use, to connect with the tracks of other railroad companies which desired to use the station (R. 39). The Terminal Railroad of St. Louis was organized in 1880, for the purpose of constructing tracks from the Union Depot Company of St. Louis, to connect with tracks of various railroad companies mentioned, for the purpose of providing "the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter, the same, and all individuals and companies doing business with said railroads" (R. 30, 31). In 1889 the Union Railway and Transit Company (one of the companies mentioned in the charter of

Terminal Railroad of St. Louis) and Terminal Railroad of St. Louis consolidated to form petitioner.

These documents establish beyond the possibility of a doubt that the charter purpose of petitioner is being strictly fulfilled, i. e., the furnishing of terminal facilities to other railroad companies entering St. Louis. How then may it be said that it is failing to fulfill its franchise obligations?

This Court recognized the difference between petitioner and a trunk-line railroad in *United States v. Terminal Railroad Association*, 224 U. S. 383, 56 L. Ed. 810, 816, where it said:

“We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility.”

The Supreme Court of Missouri recognized the difference in *State ex inf. Terminal Railroad Association*, 182 Mo. 284, 296, where it said:

“Thus when the Convention was in session there were in the State corporations engaged in carrying over their railroads freight and passengers from one city to another, and other corporations engaged in transferring the cars brought by a railroad to its terminus in a city to some other point in the same city or to a common terminus of all railroad traffic in that city. The characters of the business of the two kinds of corporations were essentially different, though both related to railroad traffic. The one was railroad business in its ordinary meaning, the other railroad business of a special character. A law might naturally be designed with reference to the one without being intended to affect the other.”

Thus the difference between the two kinds of railroad companies is recognized by both this Court and the court below. Nevertheless both courts have overlooked these differences else the result would have been a reversal of the judgment herein in the court below and the issuance by this Court of its petition for certiorari here sought.

Authority and responsibility must go hand in hand; responsibility must be based upon correlative authority. It violates the most fundamental principle of justice to make A responsible for B's doings when he has no authority or control over B's actions. Applying the principle to the facts here it is seen that petitioner has no authority to prevent the M. & O. from using its facilities, but must permit it to operate over its facilities. It is an impossibility for petitioner to control the actions of an M. & O. engineer who while passing over petitioner's track sees another train on the same track ahead of the M. & O. train and carelessly refuses to stop the M. & O. train in time to avoid the inevitable collision. Thus petitioner is placed in the position of being compelled to permit its tracks to be used by the M. & O., cannot control the actions of the latter's engineer, who wantonly kills respondent's decedent, and yet is held responsible. Such a theory is violative of the most primary principles of justice.

#### IV.

It is noticed that in her brief in opposition to the petition for certiorari respondent takes the position that petitioner's counsel in his argument to the jury in the trial court admitted petitioner's liability, and cannot now contend otherwise. For fear that this contention may have persuaded this Court to deny the petition herein, may we state that there is no merit in such contention. It was made in the court below and properly ignored by that Court. Petitioner's counsel said to the jury that under the law as

declared by the trial court petitioner was liable. That is far from saying that the law given by the trial judge was correct. It was not so intended and was not so stated. The theory of petitioner is shown by the instruction (R. 57) which it requested and which the trial court refused to give, presenting the exact theory now being presented to this Court.

For these reasons petitioner earnestly and sincerely believes that this Court should grant a rehearing and order certiorari to issue herein to the Supreme Court of Missouri.

Respectfully submitted,

JOSEPH A. McCLAIN,  
LOUIS A. McKEOWN,  
ARNOT L. SHEPPARD,  
Attorneys for Petitioner.

Joseph A. McClain, Louis A. McKeown and Arnot L. Sheppard, attorneys for petitioner herein, state the above and foregoing petition for a rehearing is filed by them in good faith and for the reasons therein set forth; that it is not filed for delay or for any purpose other than to secure a rehearing of petitioner's petition for certiorari.

Joseph A. McClain,  
Louis A. McKeown,  
Arnot L. Sheppard.